TENAGA NASIONAL BHD

v.

YAHAYA JUSOH

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
[CIVIL APPEAL NO: W-02-460-2010]
20 SEPTEMBER 2013

ADMINISTRATIVE LAW: *Judicial review - Judicial review proceedings - Appeal to set aside High Court order quashing award of Industrial Court - Whether award of Industrial Court tainted with illegality, irrationality or impropriety - Whether High Court erroneously exercised appellate jurisdiction in judicial review proceedings*

LABOUR LAW: *Industrial Court - Award - Application for judicial review to quash award of Industrial Court - Whether Industrial Court committed error of law - Whether High Court could interfere with findings of fact by Industrial Court*

LABOUR LAW: *Employment - Absenteeism - Leave without approval - Failure to report back to work - Whether appellant condoned to respondent's conduct - Whether dismissal with just cause and excuse*

Upon preliminary investigations and a domestic enquiry, the respondent was found guilty of being absent from work without approval and was subsequently dismissed. The appellant contended that the respondent submitted his study leave application for the duration of two years but without waiting for the approval, the respondent absented himself from work. The respondent continued to be absent from work although his application for study leave was not approved. The respondent was issued a show cause letter by the appellant and was directed to report to work. In response to the show cause letter, the respondent stated that he assumed that the study leave was approved since the Head of Department had supported his leave application. By a letter dated 8 December 2001, the respondent agreed to report for duty as long as the appellant considered his placement at any other suitable station. The respondent was then requested to make an official application

for his placement. However the respondent failed to make the said application and continued to be absent from work. The respondent in his representation to the Industrial Court contended that there was condonation by the appellant that the respondent was promoted to the position of an Administrative Officer where he reported to work on 6 May 2002. The appellant however denied the allegation of condonation and contended that the promotion letter was issued by mistake. The Industrial Court found that the appellant had proved that the respondent was absent without leave and as such was in gross violation of discipline. Accordingly, the Chairman of the Industrial Court found the dismissal to be with just cause and excuse. The respondent then filed an application for judicial review to the High Court on the ground of condonation to quash the award of the Industrial Court. The High Court in its grounds of judgment stated that there was clear evidence of condonation from the appellant's conduct in allowing the respondent to continue to hold the promoted post as an Administrative Officer until his dismissal in November 2002. The High Court allowed the respondent's application and held that the Chairman of the Industrial Court had committed an error of law in failing to address his mind to the issue of condonation and found the award of the Industrial Court to be tainted with irrationality. The centre of the appellant's appeal was that the High Court had erroneously exercised its appellate jurisdiction in judicial review proceedings.

Held (allowing appeal with costs; setting aside order of High Court and restoring award of Industrial Court)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The role of the High Court in a judicial review application was highly limited and differed from a normal appeal. A judicial review was not an appeal from a decision but a review of the manner in which the decision was made. The High Court should not interfere with the decision of the Industrial Court unless there was a real error of law. The review may extend to substance of the decision and not just the decision making process where there was illegality, irrationality or impropriety. (para 14)

(2) The issue of condonation was considered by the Chairman of the Industrial Court. The Industrial Court accepted the evidence of the witness for the appellant on the circumstances that led to the preparation and issuance of the letter of promotion before making a finding that the letter of promotion was mistakenly issued and was dubiously obtained by the respondent. These were matters for the Chairman of the Industrial Court who had made his decision based on the findings of fact. By re-assessing the evidence and considering the matter as an appeal, the High Court had exceeded its judicial review function and not acted within the parameters of the *certiorari* jurisdiction. (paras 15, 19 & 24)

(3) There was clear evidence before the Industrial Court that the respondent was allowed to remain as an Administrative Officer which maintained his previous salary pending investigation into how the respondent obtained the letter of promotion and pending disciplinary proceedings. As such, there was no real error on the part of the learned Chairman. Given the fact that the disciplinary proceedings had never been withdrawn or abandoned by the appellant, there was no illegality, irrationality or impropriety in the award of the Industrial Court. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Setelah siasatan awal dan siasatan domestik dijalankan, responden didapati bersalah kerana gagal menghadirkan diri ke tempat kerja tanpa kebenaran dan kemudiannya dibuang kerja. Pihak perayu menghujahkan bahawa responden telah mengemukakan permohonan cuti belajarnya untuk tempoh masa dua tahun tetapi tanpa menunggu kelulusan, responden gagal menghadirkan dirinya untuk bekerja. Responden masih gagal menghadirkan diri untuk bekerja walaupun permohonan responden untuk cuti belajar tidak diluluskan. Responden telah diberikan surat tunjuk sebab oleh perayu dan diarahkan melaporkan diri untuk bekerja. Sebagai balasan kepada surat tunjuk sebab, responden menyatakan bahawa dia menganggap bahawa permohonan cutinya telah diluluskan kerana Ketua Jabatan pihak perayu telah menyokong permohonan cutinya. Melalui surat bertarikh 8 Disember 2001, responden telah bersetuju untuk melaporkan dirinya untuk bertugas jika responden ditempatkan di stesen lain yang sesuai. Responden kemudiannya diminta untuk membuat permohonan rasmi bagi penempatannya.

Walau bagaimanapun responden gagal untuk membuat permohonan tersebut dan masih gagal menghadirkan diri untuk bekerja. Responden dalam representasinya ke Mahkamah Perusahaan menegaskan bahawa terdapat pengampunan kesalahan-kesalahan responden oleh pihak perayu kerana responden telah dinaikkan pangkat ke jawatan Pegawai Tadbir di mana dia telah melaporkan diri untuk bertugas pada 6 Mei 2002. Perayu bagaimanapun menafikan dakwaan pengampunan kesalahan-kesalahan yang telah dilakukan oleh responden dan menegaskan bahawa surat kenaikan pangkat tersebut telah dikeluarkan secara tidak sengaja. Mahkamah Perusahaan mendapati bahawa perayu telah membuktikan bahawa responden gagal menghadirkan diri tanpa cuti dan telah melanggar dasar disiplin yang keterlaluan. Sehubungan itu, Pengerusi Mahkamah Perusahaan berpendapat bahawa pemecatan responden adalah dengan sebab dan alasan yang adil. Responden telah memfailkan permohonan untuk semakan kehakiman ke Mahkamah Tinggi atas alasan pemaafan kesalahan-kesalahan responden oleh perayu bagi membatalkan keputusan Mahkamah Perusahaan. Mahkamah Tinggi dalam alasan penghakimannya telah menyatakan bahawa terdapat keterangan jelas mengenai pengampunan kesalahan-kesalahan responden oleh perayu berdasarkan tindakan perayu yang membenarkan responden untuk terus memegang jawatan kenaikan pangkat sebagai Pegawai Tadbir sehingga pemecatannya pada November 2002. Mahkamah Tinggi telah membenarkan permohonan responden dan memutuskan bahawa Pengerusi Mahkamah Perusahaan telah khilaf secara undang-undang apabila gagal untuk mempertimbangkan isu pengampunan kesalahan-kesalahan responden oleh perayu dan mendapati keputusan Mahkamah Perusahaan tidak rasional. Rayuan perayu berkisarkan pada isu kekhilafan Mahkamah Tinggi dalam bidang kuasa rayuannya dalam prosiding semakan kehakiman.

Keputusan (mengenepikan perintah Mahkamah Tinggi; mengekalkan award Mahkamah Perusahaan)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Peranan Mahkamah Tinggi dalam permohonan semakan kehakiman adalah sangat terhad dan berbeza daripada rayuan biasa. Semakan kehakiman bukanlah rayuan daripada sesuatu keputusan tetapi adalah kajian semula cara keputusan itu dibuat. Mahkamah Tinggi tidak seharusnya mengganggu keputusan Mahkamah Perusahaan kecuali jika terdapat

kekhilafan undang-undang. Semakan kehakiman boleh diarahkan kepada isi keputusan dan bukan semata-mata proses membuat keputusan apabila terdapatnya 'illegality, irrationality atau proportionality'.

(2) Isu pengampunan telah dipertimbangkan oleh Pengerusi Mahkamah Perusahaan. Mahkamah Perusahaan menerima keterangan saksi perayu dalam keadaan yang membawa kepada penyediaan dan pengeluaran surat kenaikan pangkat sebelum membuat dapatan bahawa surat kenaikan pangkai telah dikeluarkan dengan silap dan diperolehi oleh responden secara mencurigakan. Ini adalah perkara untuk pertimbangan Pengerusi Mahkamah Perusahaan yang telah membuat keputusannya berdasarkan penemuan fakta. Dengan menilai semula bukti dan menangani semakan seolah-olah ia adalah rayuan, Mahkamah Tinggi telah melampaui peranan semakan kehakiman dan tidak bertindak dalam lingkungan bidang kuasa *certiorari*.

(3) Terdapat bukti yang jelas di hadapan Mahkamah Perusahaan bahawa responden telah dibenarkan kekal dalam jawatannya sebagai Pegawai Tadbir yang mengekalkan gaji sebelumnya sementara menunggu penyiasatan bagaimana responden mendapat surat kenaikan pangkat dan prosiding tatatertib. Oleh itu, tidak terdapat sebarang kekhilafan undang-undang di pihak Pengerusi. Memandangkan prosiding tatatertib tidak pernah ditarik balik atau ditinggalkan oleh perayu, tidak ada 'illegality, irrationality atau proportionality' dalam award Mahkamah Perusahaan.

Case(s) referred to:

Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy [2008] 1 CLJ 760 CA ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

For the appellants - S Nantha Balan (P Thavaselvi with him); M/s Zul Rafique & Partners

For the respondent - Ram Karpal Singh; M/s Karpal Singh & Co

Reported by Sandra Gabriel

A

JUDGMENT

Tengku Maimun JCA:

[1] The appeal before us is against the decision of the learned High Court Judge in allowing the respondent's application for judicial review.

B

[2] The respondent was an employee of the appellant. He was dismissed from the services of the appellant after a domestic inquiry found him guilty of a charge of being absent from work without permission or leave for 187 days between 1 November 2001 and 5 May 2002.

C

[3] The respondent started services with the appellant as a Kerani Tingkatan Biasa in January 1990. In May 1997 the respondent was given unpaid study leave to pursue his first degree. In May 1998, the appellant offered the respondent full sponsorship for a period of two years and 11 months to complete his degree. The consideration for the sponsorship is that the respondent was to serve the appellant for two times the total number of years of his approved study leave before he could be released.

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E

[4] Upon completion of the degree, the respondent reported for work on 27 April 2001 at Pejabat Bisnes Daerah, Jalan Klang Lama, Kuala Lumpur and assumed his old post of a clerk. In May 2001, the respondent enrolled for a master's program. He made a written application for an unpaid study leave to the then General Manager (Planning and Development Human Resource) (COW3) in October 2001. The application which was submitted through the respondent's head of department was for a period of two years commencing 1 November 2001 (the said study leave application). Without waiting for approval, the respondent absented himself from work on 1 November 2001.

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[5] *Vide* a letter dated 5 November 2001, COW3 informed the respondent that the said study leave application was not approved. On 13 November 2001 the respondent's head of department received a verbal report that the respondent had been continuously absent from work. On even date, the head of department issued a show cause letter for his absence and directed the respondent to report for work on 15 November 2001. At the same time, a warning letter was also issued to the respondent for taking leave without prior approval from 12 October 2001 to 15 October 2001 and 18 October 2001 to 23 October 2001.

H

I

[6] The respondent failed to report for work as directed. In his reply to the show cause letter, he stated that he assumed that he had obtained approval for the study leave application as his head of department had supported his application. On 20 November 2001, the respondent made an application to his head of department for unpaid study leave for a period of one month commencing 1 November 2001 to 30 November 2001. *Vide* a letter dated 3 December 2001 the respondent was informed that his application for study leave was not approved and that the decision was final.

[7] By a letter dated 8 December 2001 the respondent agreed to report for duty so long as he was not placed at Pejabat Bisnes Daerah, Jalan Klang Lama, Kuala Lumpur. On 8 January 2002 the Vice President of Human Resource replied advising the respondent to make an official application to the Manager (Administration & Management Human Resource) to consider his placement at any other suitable station of the appellant. The respondent failed to make any application and continued to be absent from work.

[8] On 4 April 2002, the respondent's head of department (COW7) prepared a preliminary investigation report which led to the domestic inquiry being held. The charge against the respondent was "Tidak hadir bertugas tanpa kebenaran atau cuti mulai 1 November 2001 hingga 5 Mei 2002". The disciplinary committee found the respondent guilty and he was dismissed. His appeal to the appeal committee was rejected.

[9] In his representation to the Industrial Court, the respondent contended that there was condonation by the appellant ie, that after the issuance of the show cause letter, he was promoted to the position of an admin officer where he reported for work on 6 May 2002 at Institut Latihan Sultan Ahmad Shah ("ILSAS") at Bangi.

[10] The appellant denied the respondent's allegation of condonation. The appellant's case essentially is that the promotion letter was issued by mistake.

[11] Having heard the witnesses, the learned Chairman of the Industrial Court found that the appellant had proven that the respondent was absent without leave from 1 November 2001 until 5 May 2002 and as such the respondent was in gross violation of discipline. The learned Chairman accordingly found the dismissal to be with just cause and excuse.

[12] The respondent filed an application for judicial review to quash the award of the Industrial Court. The main ground was in relation to the issue of condonation. The learned High Court Judge allowed the application. Her Ladyship was of the view that the learned Chairman of the Industrial Court had committed an error of law in failing to address his mind on the issue of condonation and found the award of the Industrial Court to be tainted with irrationality.

The Appeal

[13] The centre of the appellant's complaint is that the learned judge had erroneously exercised appellate jurisdiction in judicial review proceedings.

[14] The role of a High Court in hearing a case of judicial review is highly limited and rules governing judicial review application differ from that of a normal appeal as judicial review is not an appeal from a decision but a review of the manner in which the decision was made. It is not the function of the High Court to review the evidence and substitute its own view for that of the decision-maker and the High Court should not interfere with the decision of the Industrial Court unless there is a real error of law. There are limited exceptions though, where review may extend to substance of the decision and not just the decision making process ie, where there is illegality, irrationality or impropriety (*R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501; *Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy* [2008] 1 CLJ 760).

[15] In the present case, the learned Chairman of the Industrial Court has heard and seen the witnesses and has drawn conclusions from the totality of the evidence presented before him. The issue of condonation was considered by the learned Chairman who accepted the evidence of the witnesses for the appellant on the circumstances leading to the preparation and issuance of the letter of promotion, before making a finding that the letter of promotion was mistakenly issued and was dubiously obtained by the respondent. These were matters for the learned Chairman who had made his decision based on findings of fact.

[16] The relevant part of the award by the learned Chairman is reproduced below for ease of reference:

> The Claimant contended that when he received the show cause letter dated 13th November 2001 directing him to report for work on 15th November 2001, he made an appointment to see the Vice President of the Group Human Resource Department, one Datin Azizah binti Osman. He stated that Datin Azizah had advised him to stop his studies and report for work. Further that she had offered to promote him from the post of clerk to the position of Admin Officer and that he was to report on 6th May 2002 to the "Institut Latihan Sultan Ahmad Shah" at Bangi. He stated that he took her advice and reported at the institute on 6th August 2002. The Claimant produced a photocopy of the offer letter titled "Tawaran Kenaikan Pangkat ke Gred E12".
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> The claimant also stated in his evidence that COE5 Mr. Wan Razak b Wan Ismail (Pengurus Besar, Bahagian Hal Ehwal Dalaman TNB) handed over the letter of promotion to him and instructed him to report at the institute. Mr. Wan Razak testified that (4) copies of the letter offering promotion to the Claimant were prepared and sent to Datin Azizah (Vice President of Human Resource). He said that the Claimant's copy (COE23) and the Vice President's copy (COE25) were sent to the Vice President. The third copy (COE29) was sent to the Institute and the fourth copy was kept in the office file. The witness stated that the Claimant's copy was not handed over to the Claimant and it was returned to the Vice President (Human Resource). This is because Ms Khalidah bt. Haron COW4 (Ketua Pengurusan & Pembangunan Sumber Manusia) had decided to withhold the letter. COW4 Khalidah explained that when the Claimant's letter of promotion was brought to her attention in May 2002, she realised that there was some on-going disciplinary action against the Claimant. She then informed Datin Azizah by letter (COE24) of the pending action against the Claimant and returned the original copy of the Claimant's letter of promotion (COE23) to her.
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> The effect of the unrebutted evidence of COW4 (Khalidah) and COW5 (Wan Razak) is that the Claimant's letter of promotion was issued mistakenly. But on realising the mistake, the offer letter was not handed over to the Claimant. In these circumstances, the Court can only conclude that the photocopy of the promotion letter produced by the Claimant was obtained by dubious means.

[17] The learned judge in her grounds of judgment states that the clear evidence of condonation can be seen from the appellant's conduct in letting the respondent to continue to hold the promoted post as admin officer until his dismissal in November 2002 notwithstanding that disciplinary proceeding against the respondent had already commenced.

[18] This is what the learned judge said:

> ... if the said letter of offer of promotion was indeed mistakenly issued as alleged and as found by the learned Chairman in view of his pending disciplinary action why was the applicant not immediately transferred back to his previous position upon the mistake being discovered? Why was the applicant allowed to continue to serve as an Admin Officer at ILSAS in the promotion post of Gred 12?
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> COW-5 was then the Pengurus Besar (Perjawatan) Bahagian Sumber Manusia Kumpulan. He was also covering the post of Ketua Pengurusan Tatatertib TNB. He was in a position to transfer the applicant back to his previous post of kerani Tingkatan Biasa (Gred JG11). Instead, as stated earlier, the Applicant was allowed to serve at ILSAS in his promoted post of Admin Officer Gred E12.
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> To me this is clear evidence of condonation and the fact that the Applicant was not paid the salary of an executive but had continued to receive the salary of a clerical staff or that he was not authorized to give seminars, lectures or training did not nullify the fact that the First Respondent intended to promote the applicant to the position of Admin Officer Gred E12 ...

[19] We are of the view that by reassessing the evidence and by considering the matter at hand as an appeal, the learned judge had, with respect, exceeded her judicial review function. This was compounded in turn by Her Ladyship's failure to appreciate the evidence in its totality.

[20] Why the respondent was allowed to remain as an admin officer at ILSAS was explained by COW5 as can be seen below:

> 29. S : Mengapakah anda telah memaklumkan Pengurus Besar ILSAS bahawa yang Menuntut hendaklah dianggap sebagai Pegawai Tadbir Gred E12 mulai tarikh dia telah melaporkan diri pada 6.5.2002 jika Yang Menuntut tidak dinaikkan pangkat?

J : Memandangkan Yang Menuntut telah memperolehi satu salinan surat tawaran tersebut dan telah melaporkan diri di pejabat ILSAS berkuatkuasa pada 6.5.2002 serta telah diterima oleh pihak ILSAS dari tarikh tersebut, saya memutuskan untuk mengekalkan sebagaimana keadaannya pada masa itu (status quo) tertakluk kepada syarat yang Menuntut dibayar gaji seorang yang berjawatan kerani.

Ini dilakukan memandangkan penyiasatan ke dalam fakta-fakta keadaan di mana Yang Menuntut telah menerima salinan tawaran tersebut yang dibawa bersamanya ke ILSAS pada 6.5.2002 ... dan juga kerana tindakan tatatertib sedang diambil terhadap Yang Menuntut.

[21] The above explanation clarified the letter that COW5 wrote to Pengurus Besar ILSAS dated 18 September 2002:

Ingin dimaklumkan bahawa Encik Yahaya bin Jusoh, P/No. 25797 hendaklah dianggap sebagai seorang Pegawai Tadbir Gred E12 mulai tarikh beliau melaporkan diri pada 6 Mei 2002. Walau bagaimanapun, atas sebab-sebab yang Puan sedia maklum dan buat sementara ini, beliau hanya akan dibayar gaji berdasarkan gaji ketika beliau berjawatan Kerani sahaja.

[22] In the light of the above, there was clear evidence before the Industrial Court that the respondent was allowed to remain as an admin officer at ILSAS which maintained his previous salary without any increase associated with promotion, pending investigation into how he obtained the letter of promotion and pending disciplinary proceedings.

[23] As such, we do not find any real error on the part of the learned Chairman. Given the fact that the disciplinary proceedings had never been withdrawn or abandoned by the appellant, there is no illegality, irrationality or impropriety in the award of the Industrial Court.

[24] In substituting her own views to that of the learned Chairman and in coming to a different conclusion on facts, on the basis of the same evidence, we find that the learned judge has not acted within the parameters of the *certiorari* jurisdiction and has erred in so overruling the award by the Industrial Court. We therefore allowed the appeal with costs, set aside the order of the High Court and restored the award of the Industrial Court. Costs was fixed at RM15,000 here and below.